

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs July 21, 2009

**JEFFREY OWEN WALTERS v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Marshall County**  
**No. 2007-CR-166 Robert Crigler, Judge**

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**No. M2008-01806-CCA-R3-PC - Filed October 20, 2009**

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Petitioner, Jeffrey Owen Walters, was convicted of second degree murder by a Marshall County jury. As a result, the trial court sentenced him to twenty-three years and nine months in the Department of Correction. Petitioner's conviction was affirmed on appeal, and the supreme court denied permission to appeal. *State v. Jeffrey Owen Walters*, No. M2005-01856-CCA-R3-CD, 2006 WL 2405612, at \*1 (Tenn. Crim. App., at Nashville, Aug. 21, 2006), *perm. app. denied*, (Tenn. Dec. 27, 2006). Petitioner subsequently sought post-conviction relief on the basis of ineffective assistance of counsel, including a claim that counsel was ineffective for failing to raise an issue about *Blakely v. Washington*, 542 U.S. 296 (2004). After a hearing, the post-conviction court denied the petition for relief. Petitioner appeals that decision. We determine Petitioner is not entitled to relief because, at the time of his direct appeal, a *Blakely* claim would not have been successful. Further, *Blakely* issues themselves are not cognizable in a post-conviction proceeding. The judgment of the post-conviction court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Stanley K. Pierchoski, Lawrenceburg, Tennessee, for the appellant, Jeffrey Owen Walters.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilbur, Assistant Attorney General; Mike McCowen, District Attorney General, and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### *Factual Background*

Petitioner was indicted by the Marshall County Grand Jury in November of 2003 for first degree murder. At trial, Petitioner was convicted of the lesser-included offense of second degree murder and sentenced to twenty-three years and nine months in incarceration as a violent offender. The facts which gave rise to Petitioner's conviction are taken from this court's opinion on direct appeal:

The Appellant and the victim [Shawn Oliver] had known each other for approximately two years at the time of the homicide. Prior to the shooting, several confrontations had occurred between the two, as well as a confrontation between the Appellant and the victim's friend Samuel Allen. Hostilities between the two apparently stemmed from the Appellant's relationship with Allen's girlfriend. Approximately two weeks prior to the homicide, a verbal confrontation occurred between the Appellant and the victim, and, as the two parted, the Appellant yelled to the victim, "I am going to burn you."

On October 20, 2003, the day prior to the shooting, at approximately 11:00 p.m., the victim and Allen were walking two of the victim's pit bull dogs when they encountered the Appellant. Following the encounter, the Appellant got into his car and drove by them, returning approximately five minutes later. The Appellant exited his vehicle, and, upon approaching the victim and Allen, informed them that he had heard they had been "slick talking" to others about him. The Appellant, at some point in the discussion, retreated to his car where he retrieved a pistol. According to Allen, after further talk among the three, the hostilities were thought to have receded, and the two parties separated.

Later that evening, the Appellant visited his friend and neighbor, Elmo Tears. The Appellant informed Tears that some people were bothering him and that he planned to shoot them. Tears advised the Appellant that "it ain't worth it" and asked the Appellant to leave his gun at Tears' house to avoid further trouble. The Appellant complied.

The next morning, October 21, 2003, Allen called Lasheeka Hill and learned that the victim and another friend, Eric Jett, were driving around looking for the Appellant. Shortly thereafter, the Appellant was informed that the victim and Jett were looking for him, and phone calls between the Appellant and the victim ensued. Hostilities resumed, and it was agreed that the victim and the Appellant would meet at Harmon Park to "handle" their differences by fist fight. According to Jett, he and

the Appellant negotiated the terms of the fight, and it was agreed that no weapons would be involved. Nonetheless, at approximately 4:30 p.m., the Appellant called Elmo Tears and informed him that he wanted to retrieve his pistol. Shortly thereafter, Allen, who was at the time driving the victim's car, saw the Appellant on Verona Avenue with a pistol. Allen called to inform the victim of this fact but was only able to receive his voicemail.

The Appellant then got a ride to Harmon Park with Chadrick Lyttle and Shawn Ridley in Lyttle's Chevrolet Caprice. When the victim and Jett arrived at the park in Jett's girlfriend's vehicle at approximately 5:00 p.m., they saw the Appellant, Lyttle, and Ridley standing by the Caprice. The victim exited Jett's vehicle and approached the Appellant, cursing and waving his arms. The Appellant asked Jett if he was armed, and Jett replied that he was not. Jett stated that he turned away for a moment, and, when he looked back, he saw the Appellant pointing a gun at the victim. According to Jett, the victim called the Appellant a "bitch," angering the Appellant. After the victim called the Appellant a "bitch" again, the Appellant fired three times at the victim. The victim fell to the ground, and Jett ran for help. The Appellant, Lyttle, and Ridley left the park in Lyttle's car. A sixteen-year old who had been playing ball in the park approached the victim and applied pressure to his multiple wounds until the ambulance arrived. The Appellant died as a result of multiple gunshot wounds before he could be life flighted to Vanderbilt Hospital in Nashville.

Police investigators processed the crime scene and found three .380 caliber spent shell casings, as well as a pool of blood. The investigation revealed multiple witnesses who observed the confrontation between the two men, as well as the Appellant's departure in the Caprice. No witness saw the victim with any type of weapon, and none was found at the scene.

After making contact with his girlfriend, Tamekia Rhea, the Appellant asked Rhea to drive him to his parents' home. En route, he instructed Rhea to stop at a bridge on Wallace Thompson Road. At the bridge, the Appellant got out of the car and threw a pistol and magazine into the creek below. At approximately 5:20 p.m., the Appellant was driven back to the home of Elmo Tears by Rhea. Tears overheard the Appellant on his cell phone saying that he "don't know if he's dead." Shortly thereafter, the Appellant was driven by Shante Lyles to an O'Charley's restaurant in Franklin. Later, Lyles drove the Appellant back to Lewisburg, and the Appellant returned to Rhea's home. Police received information regarding the Appellant's location, and, at approximately 2:20 a.m., they approached Rhea's house. After police knocked on the front door, the Appellant was observed fleeing from the back door, at which time he was apprehended by the police.

The Appellant was taken to the police station where he was interviewed by detectives. He initially denied any involvement in the homicide, stating that he was at an O'Charley's Restaurant in Franklin at the time of the murder. However, the Appellant abandoned his alibi defense and admitted that he shot the victim, claiming that he fired in self-defense. In his statement, the Appellant asserted that the victim was moving toward him with his hands in his pockets. The Appellant first stated that he saw only the handle of the pistol, but, when questioned further, he advised that he saw more of the pistol including, "the case, the metal of the gun and the black part of the gun." He eventually stated that the entire pistol was visible. However, when confronted about his changing story, the Appellant returned to the position that he had seen only the handle of the pistol. The Appellant also advised the detectives where he had disposed of the weapon, a .380 caliber semi-automatic pistol, although directing them to the wrong side of the bridge. Upon forensic testing, it was determined that the bullet casings found at the crime scene were fired from the recovered weapon.

*Jeffrey Owen Walters*, 2006 WL 2405612, at \*1-2.

Petitioner filed several motions for new trial, which were all denied by the trial court. He appealed his conviction to this Court. On appeal, Petitioner challenged the sufficiency of the evidence and argued that the State failed to furnish the defense all of Petitioner's in-custody statements in violation of Tennessee Rule of Criminal Procedure 16. We affirmed the conviction, concluding that the evidence was sufficient to support the verdict. Further, we determined that although the State violated the discovery rule, the error was harmless. *Id.* at \*1. The Tennessee Supreme Court denied permission to appeal. *Id.*

Subsequently, Petitioner filed a timely pro se petition for post-conviction relief. The initial petition alleged that Petitioner's "conviction was based on the unconstitutional failure of the prosecution to disclose to defendant evidence favorable to defendant" and that he was denied effective assistance of counsel. Specifically, Petitioner argued that trial counsel: (1) failed to interview witnesses until the day of trial; (2) neglected to determine what question the jury had raised during deliberation; (3) failed to call "Author"<sup>1</sup> Pertle as a witness; (4) did not investigate the vehicle at the crime scene; and (5) failed to object when Petitioner was inappropriately sentenced in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). A discussion of the holdings in these cases and their progeny follows *infra* in this opinion.

Counsel was retained by Petitioner, and an amended petition was filed. Counsel filed a motion requesting thirty days to file an amended petition for post-conviction relief. In the amended petition, Petitioner alleged the following additional ground for relief: appellate counsel did not raise a *Blakely* or *Apprendi* claim in the motion for new trial or on direct appeal.

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<sup>1</sup> In the transcript, this witness is referred to as "Arthur."

After Petitioner filed the amended petition, the State filed a response in which it alleged that the petition should be dismissed because it was not “verified under oath.”

### *Evidence at the Post-conviction Hearing*

At the post-conviction hearing, Petitioner testified at length regarding his dissatisfaction with counsel’s representation. On appeal, the only issue that is pursued relates to the failure of counsel to raise the *Blakely* issue on appeal. Appellate counsel testified that he did not include a *Blakely* claim in his brief because, at the time of the appeal, the Tennessee Supreme Court had determined in *Gomez I* that *Blakely* did not apply to Tennessee’s sentencing guidelines.

At the conclusion of the post-conviction hearing, the post-conviction court denied the petition for relief. Specifically, the post-conviction court determined that appellate counsel was not ineffective. The post-conviction court also examined Petitioner’s sentence, finding that Petitioner’s prior criminal record and criminal behavior justified his sentence and “would not be plain error, assuming *Blakely* and *Cunningham* do apply.” The post-conviction court determined that *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005) (“*Gomez I*”), was the controlling law at the time Petitioner’s direct appeal was pending and “everyone in the State of Tennessee thought [that *Gomez I*] resolved the *Apprendi* issue.” In other words, appellate counsel could not have been “expected to anticipate the law.”

Petitioner appeals the post-conviction court’s denial of post-conviction relief.

### *Analysis*

On appeal, Petitioner argues that the “post-conviction/trial court err[ed] in sentencing the Petitioner with respect to the *Apprendi*, *Blakely*, and *Gomez II* decisions.” Appellant argues that he is entitled to plain error review of his sentence because his appellate counsel and trial counsel failed to raise *Blakely* issues in the motion for new trial and on appeal. The State, on the other hand, contends that Petitioner did not receive ineffective assistance of counsel.

### *Post-Conviction Standard of Review*

The post-conviction court’s findings of fact are conclusive on appeal unless the evidence preponderates otherwise. See *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court’s findings unless the evidence in the record preponderates against those findings. See *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. See *State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court’s conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. See *Shields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

### *Ineffective Assistance of Counsel*

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below “the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel’s deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). “Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim.” *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997).

As noted above, this Court will afford the post-conviction court’s factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court’s findings. *See id.* at 578. However, our supreme court has “determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo” with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

In the case herein, a brief discussion of the changes in sentencing laws is appropriate to our analysis. In June 2004, the United States Supreme Court held in *Blakely* that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely*, 542 U.S. at 301 (quoting *Apprendi*, 530 U.S. at 490). The Court held that for Sixth Amendment purposes, the “statutory maximum” to which a trial court may sentence a defendant is that which is based only on those facts reflected in the jury verdict or admitted by the defendant. *Id.* at 542. Under *Blakely*, then, the maximum sentence which may be imposed is the presumptive sentence applicable to the offense. *See id.* The trial judge may impose a sentence that exceeds the presumptive sentence based only on the fact of a defendant’s prior conviction(s) or on other enhancement factors found by the jury or admitted by the defendant.

Following *Blakely*, the Tennessee Supreme Court concluded in *Gomez I*, that the Tennessee Sentencing Reform Act of 1989 did not impermissibly infringe on the province of the jury in violation of a defendant's Sixth Amendment right to jury trial. *Gomez*, 163 S.W.3d at 661. Thereafter, the United States Supreme Court vacated the decision in *Gomez I* and remanded for reconsideration in light of its decision in *Cunningham v. California*, 549 U.S. 270 (2007). On remand, our supreme court held that a trial court's enhancement of a defendant's sentence on the basis of judicially determined facts other than the defendant's prior convictions violates the defendant's Sixth Amendment rights. *State v. Gomez*, 239 S.W.3d 733, 740-41 (Tenn. 2007) ("*Gomez II*").

At the hearing on Petitioner's petition for relief, the post-conviction court carefully examined the chronology of the case prior to determining that appellate counsel was not ineffective for failing to raise *Blakely* on direct appeal. The court noted that the homicide occurred on October 22, 2003. Petitioner was convicted on June 2, 2004. The *Blakely* decision was rendered on June 24, 2004. The motion for new trial was filed on June 29, 2004. A supplement to that motion was filed on July 2, 2004. The second supplemental motion for new trial, raising *Blakely* as an issue in regard to Petitioner's sentence, was filed on August 4, 2004. *Gomez I* was filed on April 15, 2005. The motion for new trial was denied on July 20, 2005, and Petitioner's appeal to this Court was initiated. The *Blakely* issue was not pursued on appeal, presumably due to the decision in *Gomez I*, in which the Tennessee Supreme Court determined that the sentencing scheme did not violate a defendant's rights. This Court issued the opinion on Petitioner's direct appeal on August 21, 2006, and the supreme court denied permission to appeal on December 27, 2006. *Cunningham* was not filed until January 22, 2007. The decision in *Gomez II* followed on October 9, 2007. The petition for post-conviction relief was first filed on December 31, 2007. The evidence does not preponderate against the determination of the post-conviction court. At the time Petitioner's appeal was filed, *Gomez I* was the controlling law. Counsel's performance was not deficient for failing to anticipate a change in the law as it existed in Tennessee at the time of Petitioner's direct appeal.

Lastly, to the extent that Petitioner is attempting to gain relief from his sentence via retroactive application of the *Blakely* decision, we note that this Court has repeatedly held that *Blakely* did not announce a new rule of law entitled to retroactive application in a post-conviction proceeding. See e.g., *Glen Cook v. State*, No. W2006-01514-CCA-R3-PC, 2008 WL 821532, at \*10 (Tenn. Crim. App., at Jackson, Mar. 27, 2008), *perm. app. denied*, (Tenn. Sept. 29, 2008); *Carl Johnson v. State*, No. W2003-02760-CCA-R3-PC, 2005 WL 181699, at \*4 (Tenn. Crim. App., at Jackson, Jan. 25, 2005); *Donald Branch v. State*, No. W2003-03042-CCA-R3-PC, 2004 WL 2996894, at \*9-10 (Tenn. Crim. App., at Jackson, Dec. 21, 2004). Therefore, Petitioner has not alleged a cognizable basis for post-conviction relief, and he is not entitled to relief on this issue.

*Conclusion*

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

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JERRY L. SMITH, JUDGE